In The Senate of the United States

Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)
	)

THE HOUSE'S OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR AUTHORITY TO ISSUE OR, ALTERNATIVELY, ASSISTANCE IN ISSUING, DEPOSITION SUBPOENAS AND REQUEST FOR EXPEDITED CONSIDERATION

The House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Senate Impeachment Trial Committee ("Committee") this Opposition to Judge Porteous's above-captioned motion seeking to take depositions of ten witnesses.

I. OVERVIEW

An impeachment trial is not simply a variant of the civil litigation process. Accordingly, Judge Porteous has no inherent right to take any depositions in connection with this Impeachment proceeding. Moreover, Judge Porteous has not satisfied the narrow criteria pursuant to which depositions were permitted in the Hastings Impeachment proceedings, that is, for witnesses who have not previously testified and whose testimony is central to the case of the party seeking to take the deposition. To the contrary, many of the witnesses who Judge Porteous seeks to depose have testified on multiple occasions, including circumstances where they were called by Judge Porteous, cross-examined by Judge Porteous or his counsel, or where Judge Porteous's counsel was

provided the opportunity to examine them and declined to do so. Indeed, Judge Porteous's assertion that he "has not yet had a full and fair opportunity to question the witnesses which [sic] will be called against him" is patently inaccurate. Moreover, three of the ten witnesses have extremely limited roles – namely, identifying and authenticating their 1994 write-ups of interviews with Judge Porteous. As to these witnesses, Judge Porteous has been provided the write-ups of the interviews, and the contents of their trial testimony is thus well-known to Judge Porteous. Judge Porteous's Motion should therefore be denied.

II. JUDGE PORTEOUS'S MOTION SHOULD BE DENIED BECAUSE THE WITNESSES HAVE EITHER ALREADY TESTIFIED OR ARE NOT SUFFICIENTLY CENTRAL TO HIS CASE

In support of his request for depositions, Judge Porteous cites to certain arguments made by counsel in the Hastings Impeachment.[1] Specifically, Judge Porteous somewhat disingenuously cites to certain positions of the parties in that case, but fails to discuss the actual ruling of the Senate Committee, which, in substance (and with one narrow exception), rejected the parties' requests for depositions where prior witness testimony was available.

The pertinent language of the Senate's ruling is as follows:

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[1]Even this discussion of the procedural history is incomplete. The position of the House, as stated by its Manager (Rep. Bryant), made it clear that the House's request for depositions was in response to Judge Hastings's request: "Let me also say, we are not urging the Senate either to grant them [witness depositions] or not grant them. We are pointing out that there is no authority to insist upon them. If you choose to grant them, very well, we would like to have our three granted as well, is all I am saying." Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings ["Hastings Hearing Report"], S. Hrg. 101-194, Pt. 1 at 558 (1989) (statement of Mr. Bryant).

> In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.[2]

The Hastings Committee permitted certain depositions. In approving one of the House depositions, the Committee noted that the witness "has never previously testified."[3] Other requests by the House for witness depositions were denied because "there is no indication that either of these witnesses is sufficiently central to these proceedings. . . ."[4] The Committee approved one deposition sought by Judge Hastings "because Judge Hastings has argued that [the witness's] testimony may be especially central to his defense."[5] The Committee further informed Judge Hastings that he could supplement his deposition requests, but in doing so, Judge Hastings "should be mindful of whether or not he has access to the individual's prior testimony."[6]

The narrowness of that Order is underscored by a consideration of the Hastings Hearing where the Hastings Committee consider the parties' respective deposition requests. At that Hearing, the Hastings Committee focused on two points in particular, as

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[2]Impeachment Trial Committee Disposition of Pretrial Issues Fourth Order ["Fourth Order"], May 24,1989 at 5-6, published in Hastings Hearing Report, at 601, 605-06 (emphasis added). That Order is attached to this Opposition as "Attachment 1."

[3]Fourth Order at 8, Hastings Hearing Report at 608.

[4]Fourth Order at 7, Hastings Hearing Report at 607.

[5]Fourth Order at 6, Hastings Hearing Report at 606.

[6]Fourth Order at 7, Hastings Hearing Report at 607. That Order also required a showing by Judge Porteous as to whether the witnesses would provide him information voluntarily.

reflected in the subsequent order. First, the Hastings Committee focused on the extent to which the depositions would permit the moving party to affirmatively advance its case.[7] That concern is entirely antithetical to the request by Judge Porteous, namely, that he should be permitted to depose the House's witnesses – not for the purposes of advancing his case, but, essentially to have a dry run at cross-examination. Second, the Hastings Committee drilled down on whether prior transcripts for the given witnesses were available. As Vice Chairman Specter stated, after inquiring whether a given witness had testified: "That is an important fact, at least in my mind. If someone has testified before, I would be disinclined to use compulsory process [to obtain a deposition] on her."[8]

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[7]Thus, nearly the entire colloquy associated with the deposition motions consisted of the Senate seeking proffers from both the House and Judge Hastings of what they expected the witnesses to testify to and how that testimony would affirmatively advance their cases. See Hastings Report at 557-81. Thus, for example, Vice Chairman Specter asked Mr. Baron as to one witness: "What would you expect her to testify to?" Id. at 558. Chairman Bingaman discussed with Judge Hastings's attorney how the witnesses would "prove the [Judge Hastings's] theory or to develop the theory . . ." Id. at 563. As to another witness, Vice Chairman Specter asked: "What would expect to prove through him." Id. at 571. As to Department of Justice and FBI officials, Chairman Bingaman asked: "What is your either [sic] offer of proof or hope for proof?" Id. at 574. As to another witness, Senator Specter asked: "[W]e are waiting to hear what relevance there is to anything, to an offer of proof." Id. at 575. Judge Porteous juxtaposes Mr. Baron's statements in Hastings in which he explains why the House sought a deposition of a potential House witness (that is, to know what the witness would say before the House were to call him) to support the contention that Judge Porteous should be entitled to depose the House's witnesses in this case, where such depositions have no possible relevance to the proof of Judge Porteous's case. These different reasons for a deposition are night and day.

[8]Hastings Report at 563. See also: "Vice Chairman: Hasn't he testified before at Judge Hastings' criminal trial?" Id. at 562; "The Chairman: [Y]ou have got a lot of testimony by most of these people. Most of these are not new names. It seems that that should give you some inclination of what you expect to face when you get into the trial." Id. at 562; "[Judge Hastings's attorney]: [O]ne problem is that [the witness] has never testified anywhere." Id. at 566; "The Chairman: Do you have that transcript? [Judge Hastings's attorney]: I do, indeed." Id. at 567.

Thus, the principles that emerge from the Hastings Impeachment, individually and collectively, compel the denial of Judge Porteous's deposition requests. As described in detail below, as to seven of the witnesses, there is "already . . . a sufficient basis for trial preparation in . . . previous testimony," and, as to the remaining three, "there is no indication that [they] are sufficiently central to these proceedings." Finally, Judge Porteous advances no credible contentions and fails to proffer any claim that that any of the witnesses have evidence that would affirmatively support his defense. Certainly, Judge Porteous has not demonstrated a "strong showing of need" for depositions, that is, the need to depose: 1) central witnesses, 2) who have never testified or who have refused to cooperate, and 3) who are alleged to have relevant evidence "that is especially central to his defense." As described below, none of the witnesses listed by Judge Porteous satisfy these criteria.

III. JUDGE PORTEOUS HAS NOT DEMONSTRATED ANY NEED TO DEPOSE THE WITNESSES WHO HE HAS LISTED

The following witness-by-witness discussion sets forth the notice that Judge Porteous presently has of the anticipated trial testimony, as well as the numerous witnesses whom Judge Porteous or his counsel have actually cross-examined, been given the opportunity to cross-examine, or have called as a witness. As is clear, in light of the detailed notice that has been provided to Judge Porteous of the precise contours of the witnesses' testimony, Judge Porteous cannot meet the "need" showing that was required in the Hastings Impeachment proceedings:

1) Jacob Amato. Mr. Amato has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task

Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. Judge Porteous was present during Mr. Amato's House testimony. All transcripts have been provided to Judge Porteous's attorneys, and Judge Porteous will be able to assist his attorneys in the examination of Mr. Amato at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Amato.

2) Robert Creely. Mr. Creely has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. Judge Porteous was present at Mr. Creely's House testimony. All transcripts have been provided to Judge Porteous's attorneys, and Judge Porteous will be able to assist his attorneys in the examination of Mr. Creely at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Creely.

3) Louis Marcotte. Mr. Marcotte has been interviewed by the FBI on numerous occasions on matters that involved Judge Porteous, and he testified before the House Impeachment Task Force. Judge Porteous's attorneys were provided the opportunity to cross-examine Mr. Marcotte in his House testimony. Judge Porteous was present at Mr. Marcotte's House testimony. The House transcript and the FBI "302s" constituting the write-ups of Mr. Marcotte's interviews have been produced to Judge

Porteous. Judge Porteous is fully aware of Mr. Marcotte's testimony and will be able to assist his attorneys in the examination of Mr. Marcotte at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Mr. Marcotte.

4) Lori Marcotte. Ms. Marcotte has been interviewed by the FBI on numerous occasions on matters that involved Judge Porteous, and she testified before the House Impeachment Task Force. Judge Porteous's attorneys were provided the opportunity to cross-examine Ms. Marcotte in her House testimony. Judge Porteous was present during Ms. Marcotte's House testimony. The House transcript and the FBI "302s" constituting the write-ups of Ms. Marcotte's interviews have been produced to Judge Porteous. Judge Porteous is fully aware of Ms. Marcotte's testimony and will be able to assist his attorneys in the examination of Ms. Marcotte at the Impeachment trial. No reasons exist to permit Judge Porteous to depose Ms. Marcotte.

5) Rafayel Goyeneche. Mr. Goyeneche participated in an interview of Judge Porteous in November of 1994. This interview occurred as part of Mr. Goyeneche's investigation of a complaint that Judge Porteous, in his final days on the state bench, had set aside the conviction of a Marcotte employee (Aubrey Wallace) as a favor to Louis Marcotte. In that interview, when asked about his relationship with Louis Marcotte, Judge Porteous had admitted going to Las Vegas with Louis Marcotte, but denied that Louis Marcotte had paid for his trip. This interview was

written up by Mr. Goyeneche and was maintained in the files of the Metropolitan Crime Commission. It has been provided to Judge Porteous. If Mr. Goyeneche were called as a witness, he would identify the write-up of the interview. There is nothing unusual or surprising about this testimony, which would warrant Judge Porteous taking Mr. Goyeneche's deposition.

6) FBI Special Agent DeWayne Horner. Agent Horner has testified twice (before the Fifth Circuit and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Agent Horner will testify primarily as a summary witness as to financial records or certain background information concerning the Wrinkled Robe investigation, to the extent relevant. No reasons exist to permit Judge Porteous to take the extraordinary step of deposing FBI Agent Horner on these issues.

7) Joseph Mole. Mr. Mole has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was cross-examined by Judge Porteous before the Fifth Circuit and was cross-examined by Judge Porteous's attorney before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Mr. Mole will testify about the Liljeberg trial – facts about which Judge

Porteous is well aware. No reasons exist to permit Judge Porteous to depose Mr. Mole.

8) Claude Lightfoot. Mr. Lightfoot has testified three times (before the Grand Jury, the Fifth Circuit, and the House Impeachment Task Force). He was called as a witness by Judge Porteous and questioned by him before the Fifth Circuit, and his attorney had the opportunity to cross-examine Mr. Lightfoot before the House. All transcripts of his prior testimony have been provided to Judge Porteous's attorneys. Mr. Lightfoot will testify about his representation of Judge Porteous in Judge Porteous's bankruptcy proceedings – facts about which Judge Porteous is well aware. No reasons exist to permit Judge Porteous to depose Mr. Lightfoot.

9) Bobby Hamil. Mr. Hamil was an FBI Agent who participated in interviews of Judge Porteous as part of the FBI background investigation in 1994. These interviews were written up by Mr. Hamil or his partner Cheyanne Tackett (and reviewed by Mr. Hamil), and were made part of the background check files. The entire background check, including the write-ups of these interviews, have been provided to Judge Porteous. If Mr. Hamil were called as a witness, he would identify the write-ups of the interviews as being true and accurate. There is nothing that is unusual or surprising about this, as to warrant Judge Porteous taking Mr. Hamil's deposition.

10) Cheyanne Tackett. Ms. Tackett was an FBI Agent who participated in at least one interview (with Bobby Hamil) of Judge Porteous as part of the FBI background investigation in 1994.[9] The interview was written up by Ms. Tackett (and reviewed by Mr. Hamil) and included in the background check. The entire background check, including the write-up of the interviews with Judge Porteous, have been provided to Judge Porteous. If Ms. Tackett were called as a witness, she would identify the write-up of the interviews as being true and accurate. There is nothing that is unusual or surprising about this testimony, as to warrant Judge Porteous taking Ms. Tackett's deposition.

IV. CONCLUSION

Requests for depositions, which were deemed "unprecedented" in 1989, now have only the very limited precedent of the Hastings Impeachment to support them. Moreover, even to the extent that this Committee refers to the Hastings Committee's reasoning for guidance, it is apparent that Judge Porteous has not and cannot meet the criteria for depositions that were set forth in Hastings. Judge Porteous has been provided detailed notice of the anticipated Impeachment trial testimony of all the witnesses whom he seeks to depose, which is more than sufficient to permit him to prepare his defense. Indeed, Judge Porteous's requests for depositions of witnesses who have previously testified or are otherwise not central to his defense are fundamentally inconsistent with the requests that were actually approved by the Hastings Committee, and a fair reading of the Hastings Committee's Order compels that Judge Porteous's motion be denied.

[9]It is likely the House will not call both Mr. Hamil and Ms. Tackett. That decision will be made closer to trial.

WHEREFORE, because Judge Porteous has failed to demonstrate a "strong showing of need" for these witness depositions – indeed, because the procedural history demonstrates he has no need for them – the House requests that Judge Porteous's Motion for Depositions be Denied.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

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July 7, 2010

Attachment 1

United States Senate

WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL ISSUES
FOURTH ORDER

Upon consideration of the submissions of the parties and after hearing from them at the pretrial conference of May 18, 1989, the chair, in consultation with the vice chair, issues the following rulings on behalf of the committee:

Stipulations

Senate Resolution 480 of the 100th Congress, which was agreed to on September 30, 1988, requested the parties to work together to stipulate to evidentiary matters that are not in dispute and to report to the Senate on the stipulations to which they had agreed. On December 15, 1988, the House served proposed documentary and factual stipulations. On February 20, 1989, the parties reported to the Senate that they had reached no agreement on any stipulations.

On January 17, 1989, by which time it may have become apparent that a voluntary stipulation process would not be productive, the House proposed that the Senate "adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true." The House also requested that the Senate "adopt a parallel rule addressing

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the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true." Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration, at 2-3.

On March 31, 1989, the House renewed its proposals on admissions concerning facts and documents, and resubmitted its stipulation of facts in revised form. In a filing with the committee on April 2, 1989, Judge Hastings stated his opposition to the House's proposals for stipulations prior to trial. A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent, at 31-32.

The committee heard oral argument by the parties on April 12, 1989, and issued its first order on pretrial issues on April 14, 1989. In that order, the committee adopted the House proposal that any proposed stipulation of fact be accepted as true unless the opposing party files an objection, including a proffer as to why the proposed stipulation should not be taken as true. A like rule was adopted for the stipulations as to documents. By its second order, dated April 21, 1989, the committee extended to May 17, 1989 the date for the filing of Judge Hastings' response to the House

stipulations. The second order also extended until May 17, 1989, the date for Judge Hastings to file his own stipulations, which, like those of the House, would be accepted as true unless a specific objection was filed. Judge Hastings chose not to file his own stipulations.

Judge Hastings' Response to Stipulations Proposed by the House, which was received by telecopy on May 18, 1989, does not comport with the committee's order. Judge Hastings has in large part failed to respond to the stipulations proposed by the House. Although his response makes certain generalized objections, a few specific objections, and several generalized concessions, the committee in most cases is unable to determine Judge Hastings' position with respect to particular House stipulations. Instead, Judge Hastings, without having asked the committee to reconsider the April 14, 1989 order at any time between its issuance and the May 17, 1989 date for compliance, argues that he should not be required to take part in this process of identifying those matters that are not truly in contest. While the committee appreciates the inevitable burdens which these proceedings impose on all concerned, it believes that these burdens can best and most efficiently be discharged by complying with its orders, rather than by reiterating at length the difficulties of compliance.

The committee continues to believe that both parties as well as the Senate will benefit from a narrowing of the issues to those matters which are truly in dispute. The committee accordingly will review the stipulations proposed by the House and give careful consideration to any specific objections that it is able to identify in Judge Hastings' May 18, 1989 response and in any supplement that he may file to that response by June 1, 1989. Upon completion of its review, the committee will issue a ruling that sets forth the matters which shall be deemed to be found as true as a matter of record for purposes of the committee's evidentiary proceedings and its report to the Senate of matters that are not in dispute.

If Judge Hastings wishes to participate further in this process of distinguishing contested from uncontested issues, he may submit an additional response to the House's proposed stipulations on or before June 1, 1989. That response shall set forth for each proposed fact and each document his specific objection, or lack of objection, to each particular stipulation. In so doing, Judge Hastings should respond to each factual and documentary stipulation proposed by the House: for example, that a particular document is authentic or is a business or public record, or that a particular fact is true. He need not address whether a particular document or fact is relevant and admissible in evidence.

Although the House has referred to its "proposed stipulation[s] regarding the admissibility of a document," see page 2 supra, we agree with both parties that documentary admissions need go no further than the genuineness of the documents and, for those categories specifically identified by the House, their status as records of regularly conducted activities or public records, see Proposed Stipulations of Documents, filed December 15, 1988, at 1. Admissions concerning facts also need go only to their truth and not to their relevance.

Depositions

By its April 14, 1989 order, the committee advised Judge Hastings that it would consider his request to take pretrial depositions if he provided a list of, and certain information concerning, his proposed deponents. Judge Hastings responded with a Request for Specific Depositions, filed on May 10, 1989, in which he asked that subpoenas be issued for sixteen individuals. The House, on May 16, 1989, filed a request for the issuance of deposition subpoenas, naming three individuals.

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition

could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.

For persons whom Judge Hastings designates as "Participants in Borders's Scheme," the committee declines to issue the requested subpoenas for Rebecca Sutton Nesline and Peter Chaconas. No showing has been made that either Rebecca Sutton Nesline or Peter Chaconas has knowledge of any matter relevant to the Articles of Impeachment. With respect to Joseph Nesline, before deciding whether a threshold showing has been made which might justify the issuance of a subpoena, the committee requests that the House make available to the committee the information in the House's possession concerning Mr. Nesline's competency as a witness.

The committee will grant Judge Hastings' request for the issuance of a subpoena to William Dredge for pretrial testimony. Although Mr. Dredge's testimony before the Eleventh Circuit Investigating Committee is available to Judge Hastings' counsel, the committee has decided to permit a pretrial examination of Mr. Dredge because Judge Hastings has argued that Mr. Dredge's testimony may be especially central to his defense. The committee requests that the parties confer with each other on arrangements for a pretrial examination of Mr. Dredge and that they advise the committee about available dates for that examination so that a subpoena

may be issued for a suitable time.

Concerning the FBI and Justice Department officials for whom Judge Hastings requests the issuance of deposition subpoenas, Judge Hastings is ordered, on or before June 1, 1989, to provide the committee with a list of the three individuals, in order of priority, whom he deems most important to depose. In compiling that list, he should be mindful of whether or not he has access to the individual's prior testimony. He should also furnish to the committee at that time any supporting information, including documentation, which supports his claim that these persons possess knowledge relevant to the Articles of Impeachment, and shows that he is in fact unable to obtain information voluntarily from those persons. The committee will then determine whether it will issue subpoenas for their pretrial examination.

With respect to the House requests, the committee declines to issue subpoenas for Marilyn Carter and Alan G. Ehrlich, both of whom have given previous testimony which is available to the House for its trial preparation. In contrast to Mr. Dredge, whose pretrial examination we will allow, there is no indication that either of these witnesses is sufficiently central to these proceedings to warrant the issuance of subpoenas for their pretrial examination. The committee has decided that a subpoena shall issue for Joanne Tyson Colt, who was a law clerk in Judge Hastings' chambers

in October of 1981, who has never previously testified, and who has refused to be interviewed by the House. The requested subpoena shall issue for her pretrial testimony after counsel for the parties have advised the committee about available dates for Ms. Colt's pretrial examination.

Conduct of Evidentiary Hearings

Pursuant to the committee's second pretrial order, issued on April 21, 1989, the committee heard from the parties at the May 18, 1989 pretrial conference on various proposals concerning the conduct of the evidentiary hearings which shall begin on July 10, 1989. To the extent that Judge Hastings' submissions to the committee should be understood to be a request to postpone those hearings, that request is denied.

One of the issues that the parties addressed, at the committee's request, was whether the evidentiary proceedings should be bifurcated to permit the taking of each party's evidence first on the bribery and perjury articles and second, after receiving all the evidence on those matters, on the wiretap disclosure article. Judge Hastings objects to bifurcation because it would require him, if he testifies, to divide his testimony into two parts. We will respect Judge Hastings' objection and will not bifurcate the evidentiary hearings. The committee will accommodate the interest of the House in deferring, if it so wishes, the portion of its

opening statement on the wiretap disclosure issue to the point in the presentation of its evidence when it is prepared to present its case on that issue.

At the May 18, 1989 conference, the parties also briefly discussed whether it would be appropriate to permit introduction of prior testimony, taken in United States v. Borders, United States v. Hastings, and before the Eleventh Circuit Investigating Committee, in place of taking live testimony before this committee. The committee believes that the use of such prior recorded testimony is desirable in certain circumstances, particularly, for example, where the testimony is not that of a key witness whose credibility is at issue, and encourages its use consonant with fairness to the parties and the development of a coherent record for use by the Senate.

Accordingly, both parties are directed to file and serve, no later than June 14, 1989, an identification of the prior testimony which, to the best of their knowledge, they in fact intend to offer into evidence. That identification shall: (1) specify the proceedings from which the proffered testimony is drawn, (2) append a copy of the proffered testimony, and (3) briefly state why the party believes that it would be appropriate to submit that particular testimony by way of prior recorded testimony rather than through a live witness. Each party shall in its pretrial statement on

June 21, 1989, state, for each such proffer of prior testimony by the opposing party, whether or not it objects to introduction of that prior testimony and, if so, the specific nature of its objections.

The parties were also invited to suggest ways in which the evidentiary proceedings could be structured to permit the taking of evidence within a three-week period of time. In response, the House suggested that the committee adopt the procedure, used by United States District Judge Pierre Laval in the Westmoreland v. CBS defamation case, of dividing a predetermined number of hours between the parties, leaving each side free to determine how its case can best be presented within the available time. Judge Hastings has not responded to the particulars of the House proposal or offered any specific proposals of his own.

The committee believes that guidelines, fairly and flexibly applied, must be adopted to facilitate realistic trial preparation and to enable the Senate and the parties to focus on matters that will be important to the Senate's disposition of the Articles of Impeachment. In framing their final pretrial statements, due on June 21, 1989, and in preparing for the evidentiary proceedings which will commence on July 10, 1989, the parties should operate within guidelines premised on the availability of eighty trial hours during the course of three weeks of hearings. Reserving several hours for miscellaneous matters, the parties should

anticipate that they will each have thirty-eight hours in which to present their evidence on all matters, dividing their time as each sees fit between direct and cross-examination. In addition, each party may present an opening statement of no longer than one hour, which, if either party wishes, may be divided into two portions.

The parties should address in their final pretrial statements of June 21, 1989, and be prepared to discuss at the pretrial conference on June 22, 1989, the amount of time which they intend to allocate to direct testimony, whether by prior or live testimony, and whether their preparation has shown that some modification of these guidelines is necessary. The committee is mindful that the foregoing guidelines may need adjustment, both before commencement of the evidentiary proceedings and in the course of those proceedings, and that there must, and will, be flexibility in their application.

An additional order providing further details about the required content of the final pretrial statements will be issued shortly.

Jeff Bingaman
Chairman

Arlen Specter
Vice Chairman

May 24, 1989